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In the Supreme Court of the United States

October Term, 1915

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER
No. 12 ORIGINAL

Memorandum Submitted by the New York State Probation Commission as Amicus Curiae

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MEMORANDUM

The State Probation Commission respectfully begs to present this memorandum concerning the development and use of the suspended sentence and the probation system in the various states as having an important bearing upon the case before the court.

This case relates to the inherent power of the judges of the United States Courts to suspend the imposition or the execution of sentence indefinitely in criminal cases in which conviction has been obtained but in which, in the opinion of the court, there exist circumstances in mitigation of the offense and in which such suspension of sentence appears compatible with the public interest and the best interests of the defendant.

The power to suspend sentence has become well established in the criminal courts of England and of the various states and has been exercised from very early times. This has been recognized in practice and by a number of court decisions.

In the case of People ex rel. Forsythe v. Court of Sessions, 141 N. Y. 288, unanimously concurred in by the Court of Appeals in New York in 1904, Judge O'Brien said:

> "There can I think be no doubt that the power to suspend sentence after conviction was inherent in all such courts (superior courts of criminal jurisdiction in England) at common law. The practice had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable upon the facts by any higher court. The power as thus exercised is described in this language by Lord Hale: 'Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favorable or extenuating circumstances appear and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage.' (2 Hale P. C. ch. 58, p. 412.) This power belonged of common right to every tribunal invested with authority to award execution in a criminal case. (1 Chitty Cr. L. 1st ed. 617, 758.)
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> "Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts and numerous adjudged cases. (2 Hawk. P. C. ch. 51, Sec. 8; 1 Bishop's Cr. Pro.

Sec. 1124; 4 Bl. Com. ch. 31; People v. Graves, 31 Hun, 382; People v. Harrington, 15 Abb. N. C. 161; People v. Whipple, 9 Cow. 715; Carnal v. People, 1 Park. Crim. Repts. 262, 266; Commonwealth v. Dowdican, 115 Mass. 133; State v. Addy, 43 N. J. L. 114; Weaver v. People, 33 Mich. 297; People v. Reiley, 53 id. 260; Commonwealth v. Maloney, 145 Mass. 205; Sylvester v. State, 65 N. H. 193.) * * * It is a power which the court should possess in furtherance of justice to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed no complaint has been heard of its abuse."

The decision above quoted assisted in establishing the constitutionality of the suspended sentence in New York State. There have been similar decisions in other States, some of which are cited in the above. In the State of Massachusetts the practice of placing cases "on file" which is identical with the suspension of sentence as used in other States has been prevalent for a great many years. In the case of Marks v. Wentworth, 199 Mass. 44 (1908), it is stated:

"It has long been the practice in this Commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. The effect of it is fully stated in Commonwealth v. Dowdican's Bail, 115 Mass. 133. See also Commonwealth v. Foster, 122 Mass. 317, 323; Commonwealth v. Maloney, 145 Mass. 205. The case then stands on the records of the court, and although usually no

further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it."

The Probation System and Suspended Sentence

A consideration of the utmost importance is the intimate relation between the power to suspend sentence and the use of the probation system. Probation is a method by which a court disciplines and seeks to improve certain offenders without subjecting them to imprisonment. The defendants after conviction, and after investigation by the probation officer in most cases, are released under suspension of sentence upon good behavior and are placed under the authoritative oversight of a representative of the court known as the probation officer. The offenders must obey certain rules and for failure to do so they may be returned to court for the execution of sentence. The probation officer keeps informed regarding their conduct, encourages and aids them to behave properly and reports to the court frequently concerning their progress and condition. The system is applied principally to first offenders and others who because of youth or previous good record, or because of other mitigating circumstances do not appear to be in need of prison discipline and who show promise of reform under probation.

It is clear that probation is dependent upon the power to suspend sentence and is superimposed thereon. By placing the offender under supervision and discipline, probation effectively supplements and safeguards the use of the suspended sentence.

Advantages of Probation

The advantages of the use of probation in proper cases are many and generally recognized. Probation officers endeavor to establish friendly relations with the persons under their care and do whatever is most

needed to strengthen their character and better their surroundings. They secure employment for them, and, if necessary, charitable aid, medical attention and other similar services. They obtain the assistance of the relatives, friends and employers of probationers and the co-operation of churches and various philanthropic and social organizations; they encourage probationers to start bank accounts, to associate with more desirable companions, and to overcome bad habits. Through probation families are re-united and wives and children supported. Money for family support, fines imposed by the courts, and restitution for injury or loss occasioned by the crime is collected by probation officers in instalments, thus avoiding imprisonment and establishing habits of industry and thrift. In the words of the Hon. Charles A. DeCourcy, Judge of the Superior Court of Massachusetts:

> "Probation guards the young offender from the contamination and stigma incident to prisons, however well conducted. It disciplines him in a 'reformatory without walls,' without depriving his family of support and at a large saving to the State. From an experience of more than seven years I have found that the results were good in fully three-quarters of the cases when entrusted to officers who possess sound judgment and tact, humane instincts and devotion to their work."

The actual results obtained by probation in certain states will be referred to later on.

History of Probation

Probation grew out of the practice of securing some one, perhaps a court official or a volunteer social worker, to supervise offenders released under suspended sentence in order to help and improve them. The system sprang

up naturally in widely separated localities. It obtained statutory recognition first in Massachusetts in 1878 (ch. 198). In 1891 (ch. 356), probation was made a feature of the judicial system of Massachusetts by requiring the justices of all municipal, police and district courts to appoint probation officers. In 1898 the system was extended to the Superior Court. Massachusetts was followed by Illinois, Minnesota and Rhode Island in 1899; by New Jersey and Vermont in 1900 and by New York, Missouri, Kansas, Wisconsin and the District of Columbia in 1901.

In the State of New York the establishment of the probation system grew out of statutes confirming and defining the power to suspend sentence. The act of 1901 (ch. 372), provided for the appointment of probation officers in the criminal courts of the State and defined their procedure.

Juvenile probation is now established by statute in 43 states, Alaska and the District of Columbia; only 5 states are now without any probation laws. Both adult and juvenile probation are established by statute in 25 states and the District of Columbia.

Few if any reforms have had the widespread recognition and rapid development that the probation system has obtained. No statistics are available for the country as a whole, but complete statistics from certain states, especially those which have established State Probation Commissions (New York, Massachusetts and Vermont) are available.

Probation in New York State

Over 18,000 persons are annually released on probation by the courts in the State. (The total number placed on probation for the year ending September 30, 1915, was 18,572, divided as follows: Boys under 16, 5,081; girls under 16, 613; men, 11,176; women,

1,702.) During the past year there was an average of 11,153 persons on probation *at all times*. This number has shown a remarkable increase, there being but 1,672 persons under probationary care at the end of 1907, the first year complete statistics were obtained by the State Probation Commission.

In the higher courts persons are placed on probation for serious felonies and are under discipline and care for periods of from 1 to 5 years. They are required to report regularly; their homes are visited; they are kept employed and usually co-operate with the probation officer in his plans for their re-establishment as good citizens.

In all cases placed on probation the State Commission obtains a report as to the results obtained. In 1914, 78 per cent. of all cases whose probation terminated during the year were reported discharged improved; only 12 per cent. were rearrested and committed. These percentages have varied little during the past eight years.

In New York State probation officers personally collected and paid to the families of probationers $106,908 during the past year. They collected $17,899 in instalments for fines and $24,096 in instalments for restitution to injured parties.

There are at present 182 salaried probation officers serving in the State, and in addition approximately 300 part time volunteer officers.

Probation in Massachusetts

The state where probation originated has naturally developed and used the system most extensively. During the year ending September 30, 1914, 24,714 persons were placed on probation. During that year 13.5 per cent. of all criminal cases begun in the courts

were placed on probation. A total of $189,830 was collected from probationers in nonsupport cases and $56,745 in instalments for fines.

Every criminal court in Massachusetts has one or more probation officers, 129 salaried officers being so employed at the present time.

The use of the system in Massachusetts has been extended sanely and steadily and its results have been very satisfactory.

Probation in Connecticut

During the year ending September 30, 1914, 4,096 persons were placed on probation, 1,440 juveniles and 2,656 adults. A total of 6,306 cases were under care during the year. Of the cases released during the year, 3,162 observed the terms of their probation, while 464 were rearrested and committed. There are at present serving in the courts of Connecticut, 67 probation officers.

Probation in Other States

In the states of New Jersey, Illinois, California, Colorado, Indiana, Minnesota, Ohio, Pennsylvania, in the District of Columbia and in other states, probation is used extensively and successful results are reported. There is every evidence that the system has approved itself to the courts and to the people wherever it has been established. Its further extension into all parts of the country is to be expected.

Probation in Other Countries

Probation has been extensively adopted in Great Britain, Canada, New Zealand, Australia and other countries; legislation provided for the suspension of sentence and other features of the probation system is

found in France, Germany, Holland, Switzerland, Belgium and other European countries. The American system of probation has been studied and approved by penologists from all parts of the world.

Conclusion

In the United States District Courts there were 12,079 convictions during the year ending June 30, 1914. (See Report of the Attorney-General.) Five thousand nine hundred and seventy-six of these plead guilty. Many of the defendants are boys and young men and first offenders. Frequently they are taught a serious lesson by their apprehension and conviction; often they are ready and willing to co-operate with the court and the probation officer if they are given "another chance." In certain cases there are circumstances connected with the offense which make it evident that the offender, while technically and legally guilty, is not morally culpable to as great a degree as the charge and the penalty would seem to indicate. For many of these cases commitment to a prison is neither wise nor effective. It may neither serve as a protection to society in the long run nor be of any benefit to the guilty party.

In such cases the Federal judges have in many districts applied the suspended sentence and utilized such probation officers as were available. In all of the four districts of New York State the judges of the Federal Courts have in certain cases suspended sentence on young offenders and in a number of instances have requested some proper person, frequently one of the probation officers under the supervision of the State Probation Commission, to act as probation officer, thereby employing the same system as is now carried out in the New York State courts.

We are confident that the principle and method of the suspended sentence and probation is as applicable and advantageous when applied in a Federal court as it is when applied in a State court. We believe that the results will be as satisfactory, and indeed have been in many instances already.

These facts and considerations are respectfully submitted to your Honorable Body in the hope that they will assist you in arriving at a right decision in this important matter.

THE N. Y. STATE PROBATION COMMISSION,

HOMER FOLKS, *President,*

CHARLES L. CHUTE, *Secretary.*

FILED
OCT 14 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

October Term, 1915.

No. 11 Original.

EX PARTE THE UNITED STATES, PETITIONER.

Answer of John M. Killits, Judge of the District Court of the United States, for the Northern District of Ohio, to the Rule of This Court Upon Him to Show Cause Why a Peremptory Writ of Mandamus Should Not Issue, Commanding Him to Vacate and Set Aside the Certain Order Entered in Said District Court on March 15, 1915, Suspending the Execution of the Judgment of Imprisonment Against James J. Henahan.

IN THE

Supreme Court of the United States

October Term, 1915.
No. 12. Original.

EX PARTE THE UNITED STATES, PETITIONER.

Answer of John M. Killits, Judge of the District Court of the United States, for the Northern District of Ohio, to the Rule of This Court Upon Him to Show Cause Why a Peremptory Writ of Mandamus Should Not Issue, Commanding Him to Vacate and Set Aside the Certain Order Entered in Said District Court on March 15, 1915, Suspending the Execution of the Judgment of Imprisonment Against James J. Henahan.

The respondent, under said rule to show cause, says that a peremptory writ of mandamus should not issue for the following reasons:

FIRST. The District Court of the United States, of which respondent is a judge, has the power to suspend the execution of a sentence or judgment in a criminal case for either a definite or indefinite period, as circumstances require.

The power may be exercised either by suspending the imposition of sentence or by suspending the execution of sen-

The power is not limited, as claimed by the Attorney General, to definite suspensions for particular purposes, such as to give the court an opportunity to determine the proper sentence to be imposed, or to allow an appeal to be perfected, or to allow time to prosecute a defendant on other charges, or to allow a definite time for application for pardon.

It is not claimed by respondent that the power to suspend sentence indefinitely may be exercised capriciously or arbitrarily but that its exercise should be consonant with the best interests of society, in cases where either the arbitrary minimum penalty is disproportionate to the actual criminality involved in the particular offense or when, by reason of circumstances peculiar to the instant case vindication of the law may be associated with the saving of the individual as a responsible unit of society.

It is not claimed that the power may be exercised in any case against the objection of a defendant, or as a means of imposing an indefinite and uncertain punishment.

It is further claimed that the court has the power to vacate such an order of suspension and either impose sentence or order execution of sentence within a reasonable time, when the facts and circumstances show that such course would be consistent with the original suspension and that so to do would not be unjust to the convict.

It is denied that the court loses jurisdiction of the defendant by allowing him to go subject to suspended sentence in either form.

Respondent respectfully advises the court of his opinion sustained by actual experience in the administration of the criminal law, that convictions are obtained in many cases wherein otherwise disagreements or acquittals would seem to

be probable, because the juries understand that the court will recognize the circumstances peculiar to the respective cases, and, in dealing with the sentence, give attention to them, and it is respectfully suggested that the law is more dignified by convictions for unmistakable infractions, followed by an action by the court calculated to give effect to the circumstances creating sympathy for the convict by directing them to his reclamation than by suffering sympathetic verdicts of acquittal, or, which is undoubtedly a case of frequent occurrence, by reluctance on the part of prosecuting officers to bring to indictment and trial a case having sympathetic features.

Respondent rejects utterly the theory, in law or religion, that the law, human or divine, requires vindication by definite and prescribed punishment of offenders, and submits that punishment should be imposed only for the good and protection of society and claims the power in question in this proceeding should be exercised in cases in which the good, welfare or protection of society requires.

SECOND. It is respectfully suggested that the power to suspend either the imposition or the execution of sentence after conviction is not an equivalent of the pardoning power vested in the Executive, for the reason that the convict is not thereby relieved from the disabilities which a pardon removes, but remains still a convict until a pardon is granted.

In this connection respondent respectfully shows that many states, of which New York, Michigan, Illinois, Massachusetts and Ohio are cited as examples, have empowered courts to suspend the execution of sentences upon conviction and that legislation in this behalf is generally held by the State Courts as not unconstitutional as an invasion of the pardoning power vested in the Executive.

In this connection Respondent further advises the court that a practice universally exists, in a case where one stands

convicted of two or more distinct offenses, whether under two or more counts of one indictment or under separate indictments, to impose upon the convict, in the discretion of the court, concurrent sentences, although so to do may be argued to be equivalent to absolving the convict from merited punishment for all save one of his crimes. This practice has never been questioned as an apparent usurpation of executive function.

Respondent is unable to see any substantial distinction between the discretion conceded to abide in a court in such a case, and that which Respondent claims for his court and now under examination.

THIRD. Respondent respectfully shows the court that the power to suspend sentence in one form or another, has been exercised by judges of the District Court of the United States for time out of mind, and asks this court to take judicial notice of the continuous exercise of that power.

The records of the District Court of the United States, for the Districts in Ohio, show the exercise of the power to suspend execution of sentences since 1867 by Judges Sherman, Swing, Matthews, Baxter, Sage, Ricks, Wanty, McCall, Wing, Tayler, Thompson, Day, Clark, Sater, Hollister and the respondent.

Respondent has been unable to have a search made of the records of said courts prior to 1850, and cannot inform the court of instances of the exercise of the power prior to that time.

In Respondent's own district, at least since July 1, 1910, and until about January 31, 1915, when the Attorney General of the United States issued instructions to all District Attorneys to object to the practice, all suspensions of sentences were with the consent of the District Attorney, and in a majority of cases, they were upon his recommendation.

Respondent shows the court that in the District Court of the United States, for the Eastern District of Michigan, the power to suspend the imposition of sentences has been exercised since 1860 by Judges Wilkins, Longyear, Brown, Swan, Sessions, Angell and Tuttle, and in the Western District of Michigan has been exercised by Judges Wanty, Sessions and Severens.

Respondent has made inquiries of judges now sitting in various jurisdictions and from information so obtained shows that the power is now, and has been, exercised in many states.

In the Alabama districts the power has been exercised for many years by Judges Grubb and Clayton and their predecessors, Judges Bruce and Jones.

In Florida Judges Locke, Settle, Swayne, Call and Sheppard have suspended sentences in both ways since about 1870.

In Georgia Judges Speer and Newman suspend sentences and follow in this respect the practice of their predecessors, Judges McKay and Erskine.

In Illinois Judges Carpenter, Landis and Humphrey exercise the power.

In Kentucky Judges Evans, Cochran and Barr have suspended sentences.

In Massachusetts, the Federal Courts, following the established practice in the State Courts, have for many years continued cases after a plea or verdict of guilty and have subsequently placed such cases on file without sentence; this practice has been availed of, with the consent of the United States Attorney for that District, for probationary oversight of defendants during such continuances.

The case of *U. S. vs. Margaret Mulhall*, who was indicted for complicity in smuggling and who pled guilty in April, 1913, was, on 2 July, 1914, placed on file without any sentence. It was at that time represented to the court by the United States Attorney that the Attorney General of the United States requested such action.

In Missouri Judges Van Valkenburgh and Dyer and their predecessors, Philips, McPherson (sitting by designation), Thayer, Adams, Priest and Finkelberg, have exercised the power.

In Nebraska, New Jersey and New Mexico the custom prevails.

The State judges in New York appear to have exercised this power since 1816, as appears from the reports of *People vs. Reed* and other cases in 1 City Hall Recorder, at pages 4, 6, 21, 28 and 41, and by various other reported decisions.

On the record of the United States District Court, for the Western District of New York, it appears that on November 23, 1869, Judge Hall, then District Judge, suspended several sentences, and in the District Court, for the Southern District of New York, sentence was suspended in the case of *United States vs. Peter Anderson*, on January 7, 1858.

Respondent is authorized to advise this court that all of the United States District Judges now sitting in New York exercise the power of suspending imposition of sentences and believe it is essential to the proper administration of justice and understand that they are following the practice observed time out of mind by their predecessors, Wallace, Coxe, Lacombe and all District Judges in the Second Circuit.

In North Carolina, Judges Boyd and Connor report that the practice has been followed since 1872.

In North Dakota, Judge Amidon exercises the power.

In Pennsylvania, Judge Thomas Irwin exercised this power by entering an order in arrest of judgment at the October, 1854, term. Judge McCandless exercised the power in many cases, beginning in the May, 1863, term. Many orders of suspension were entered by Judge Ketcham between 1870 and 1880.

The judges now sitting in Pennsylvania, and their predecessors, Irwin, McCandless, Ketcham, Acheson, Reed, Buffington, Ewing and Young, have exercised this power.

In Tennessee, the practice has been common since 1873, and has been followed by Judges Emmons, Trigg, Baxter, Key, Clark, Jackson, Lurton, McCall and Sanford.

Sentences were suspended very frequently by Judge Baxter, particularly in revenue cases.

In Virginia, Judges McDowell and Waddill exercise this power and believe it has been continuously used by their predecessors, Judges Rives and Paul, for over fifty years.

In 1879, Judge Rives entered such an order in the case of *United States vs. Peter C. Coffee.*

In 1808 and 1809, Chief Justice Marshall then sitting at a court of the United States, for the Fifth Circuit, and Virginia Districts, suspended temporarily, for no reason appearing of record, the execution of a part (flogging) of two sentences.

In West Virginia, the power has been exercised since 1865 by Judges Jackson and Keller.

In Wisconsin, the power has been exercised by Judges Sanborn, Hopkins, Dyer and Bunn.

It appears that justices of this court while acting as circuit or district judges, have freely exercised the power of suspending sentences in criminal cases.

Mr. Justice Brown, while a district judge in the Eastern District of Michigan, entered orders suspending sentences in four hundred and fifty-six cases between 1875 and 1889.

Mr. Justice Matthews, while sitting in the Southern District of Ohio, suspended a sentence against one Martin Scholl, in 1881.

Justices Lurton and Jackson exercised this power while sitting as Circuit Judges in Tennessee.

In 1869, Mr. Justice Blatchford, in the District Court, for the Southern District of New York, exercised this power, as appears from the reported case of *United States vs. Blaisdell*, 3 Benedict, 132.

Respondent offers to make such proof as this court may require to show the continuous exercise of said power in one form or another by these and other District Courts of the United States.

The claim is now made by respondent that by such continuous exercise of this power, the usage or custom of the courts has become and is the law of the United States, and the District Courts of the United States have the power to suspend either the imposition or execution of sentence when otherwise injustice would be done.

FOURTH. Respondent shows the court that the exercise of the power now in question has been acquiesced in by the Department of Justice and the Presidents for nearly a century, and the records of the courts show instances in which the Department of Justice requested the courts to exercise the power.

The claim is now made that by such continuous exercise of the power by the courts, and by the acquiescence of the Presidents and the Department of Justice, it has been determined that the exercise of the power is not an invasion of the President's power to grant reprieves and pardons.

FIFTH. It is claimed by respondent that the common law and practices of the Federal Courts with respect to the matter now in controversy, were known to Congress and that all statutes relating to the punishment of crimes and offenses and all statutes relating to Federal Courts were enacted with reference thereto, and that by construction, in the absence of statutory language clearly inconsistent with the further observance of the common law and such practice, the common law became a part of such statutes and the law until Congress shall have unequivocally enacted otherwise.

SIXTH. If this court shall be of the opinion that the District Courts of the United States do not have the power to suspend sentences in the circumstances and to the extent herein claimed, then, it is respectfully submitted that they have the power to suspend imposition of sentence or execution of sentence as auxiliary to and in aid of the President's power to grant reprieves and pardons, and that such suspensions may be made until such time as the President refuses to pardon.

Respondent shows that it is practically impossible for the President to read and consider all applications for pardon and to act on them in time to prevent the imposition of penalties in cases in which pardons should be granted and no penalty should be suffered, and, to prevent injustice, and to enable the President to exercise his power, it is necessary that the penalties of the law be suspended until the President has acted. It will not suffice to grant a suspension of sentence for a definite time, for the President may not be able to act within the time

fixed, and the only means by which the proper result can be accomplished is by a suspension until the President has acted, that is, until he has refused a pardon.

Respondent is unable to furnish this court the data showing the great increase in the number of criminal cases in the Federal Courts, but is informed there has been a very large increase due to the increase of population and to new criminal laws enacted by Congress.

It is necessary that the information bearing upon applications for pardons be collected in advance of the presentation of such applications to the President and in most cases the collection of such information requires a considerable length of time.

Respondent directs the attention of this court to the fact that in all cases a trial court has its informaton first-hand, in the community in which the convict resides or the crime was committed, while the President must necessarily be informed by reports of investigators, pardon clerks, district attorneys, the trial courts and others.

Respondent shows that if the power, as hereinbefore claimed and as exercised by the courts, does not exist, or if it is held that suspensions may not be allowed until after the President has acted, the President will be burdened with applications that he cannot possibly consider and it will be necessary to provide some relief.

If it shall be held that the exercise of this power is an invasion of the President's power to grant reprieves and pardons, it will then be impossible, by legislation, to give relief to the President without making such legislation unconstitutional as an invasion of the President's power, unless such legislation shall be a general revision of the criminal code

eliminating all minimum penalties and permitting courts to fix an appropriate penalty not exceeding a prescribed maximum. Respondent is informed that the reason the courts of Great Britain no longer exercise this power is that their criminal law does not prescribe any minimum penalties.

Respondent further shows that the President and the Department of Justice have acquiesced in the exercise of this power by the courts and have provided that applications for pardons shall not be considered in cases in which the exercise of this power is effective to prevent the imposition of penalties, that is to say, it has been provided in the forms of applications for pardon and in the instructions relating thereto, that except in the most unusual cases applications will not be considered unless the applicant is in prison.

Respondent therefore claims that in any event he had the power to suspend the execution of the sentence against James J. Henahan until after the President had refused to pardon and that the order of suspension in the case under review should at least be considered and held to be a suspension for that time and purpose.

SEVENTH. Respondent further shows that it is necessary to the proper administration of justice that the courts should have and exercise the power to suspend sentences for the reason that the President has delegated to the Department of Justice the reading and consideration of applications for pardons.

It seems obvious to the respondent that the Government officers whose department has had charge of a criminal prosecution, may honestly have difficulty in balancing and considering the facts and circumstances bearing upon applications for pardons, and may oppose executive clemency in cases on which

judges would look with favor because of their ability to see all sides of a situation and to consider and weigh the facts bearing upon the application.

Every citizen of the United States has the right to petition the President for a pardon and has the right to a full, fair and impartial consideration of his case.

Respondent does not claim that there has been any abuse of the power thus delegated and does not suggest that there will be, but submits this statement to show that the rules and practice with respect to applications for pardons do not adequately provide for the cases in which judges have exercised the power to suspend sentences.

Respondent respectfully refers to the rules for applications for pardon and to the form of application issued by the Department of Justice, as showing that injustice may be done in many cases if the power now in question is denied.

Respondent further shows it is necessary that the courts exercise the power in question for the further reason that there is no Federal probation system. Throughout the United States; in response to the demands of the people probation systems have been provided by legislation with the view of saving offenders for useful lives and in the states in which the power now in question is denied, the courts or boards or commissions accomplish practically the same result under the provisions of the probation acts.

In Ohio, for illustration, the courts are at liberty to choose between the exercise of the common-law power to suspend execution of sentences and the use of the probation legislation, as it is found in some cases that injustice will result unless the common-law power is used.

EIGHTH. Respondent respectfully shows that the order for the suspension of the sentence against James J. Henahan, herein complained of, was not arbitrarily or capriciously granted, but was made upon the application of James J. Henahan and for the following, among other reasons:

The indictment against Henahan was for embezzlement from a national bank and for making false entries on its books, contrary to Section 5209 of the Revised Statutes of the United States, which provides that one so doing shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five nor more than ten years.

There were four counts in the indictment, alleging at least two separate offenses, so that the defendant, Henahan, was then subject to be imprisoned not less than ten years unless the court had the right, by making sentences run concurrently, to remit part of the penalty.

It was also made to appear that Henahan was a young man about thirty-one (31) years of age, and had been employed as a teller in The Second National Bank of Toledo, and that by manipulating the mutilated currency of the Bank had embezzled about Forty-five Hundred Dollars ($4,500.00); and had made false entries to conceal such transactions and had otherwise violated Section 5209 of the Revised Statutes of the United States.

As it appears in the indictments which are exhibited with the petition herein, the acts for which Henahan was indicted, occurred in June and July, 1914, and he was not indicted until March, 1915.

It appeared that after the discovery of his acts, he was discharged by the Bank and thereafter, with the assistance of his friends and relatives, made full restitution to the Bank, and that its officials did not desire to prosecute him for the offense.

It appeared that the young man had taken this money under circumstances which made him appear foolish rather than vicious, as it was obvious that he would be detected.

It appeared that he was thoroughly repentent and that he had suffered acutely for his misconduct, among other reasons because of the fact that his discharge from the Bank and the reason therefor had become known to all of his friends and business associates.

From all the circumstances it appeared that his punishment was as complete and effective in these circumstances as if he had been in fact imprisoned in the penitentiary. The young man had been recently married and it was obvious that his wife and her people were obliged to share and bear the burden of his disgrace and it seemed unnecessary to add to that burden by imprisoning him in the penitentiary.

It appeared that he was the support of his widowed mother and that his imprisonment would leave her dependent upon the charity of relatives and friends.

It was made to appear that following his discharge from the Bank and the restitution of the amount embezzled, he was given a responsible position and was giving strict attention to his business and was conducting himself in every respect in a proper manner and endeavoring to so properly conduct himself and live among the people who knew of the offense he had committed.

The order of suspension entered by respondent was recommended by the Right Reverend Joseph Schrembs, Bishop of Toledo, and by the Reverend James P. McCloskey, Pastor of St. Patrick's Church, of which Henahan was a communicant.

There was also exhibited to respondent, at or about the time said order of suspension was made, an application for a pardon signed by

Isaac R. Sherwood, Member of Congress;

Frank B. Niles, Collector of Internal Revenue;

Edwin J. Lynch, State Senator;

John P. Kelly, Clerk of Courts;

John P. Manton, Byron F. Ritchie, Curtis T. Johnson, Bernard F. Brough, the Four Judges of the Common Pleas Court of Lucas County, Ohio;

O'Brien O'Donnell, Probate Judge of Lucas County, Ohio;

George E. Parrish, Post Master of Toledo, Ohio, and many other prominent citizens of Toledo.

Respondent was also informed at said time by Mr. Morrison W. Young, President, and Mr. William C. Carr, Vice-President of The Second National Bank, that the Bank had no desire to prosecute Henahan and that they recommended a suspension of sentence and would recommend a pardon.

In the circumstances which were thus made to appear, although it might be claimed that the execution of a sentence of ten (10) years imprisonment would not be unjust so far as Henahan was concerned, inasmuch as he had committed the offense and perhaps should have anticipated the penalty, respondent took the view that the imposition of that sentence would nevertheless be unjust to society, as it would, without any question, result in the loss, or at least prevent the making of a useful citizen.

Respondent respectfully submits that the function of the District Court of the United States is to administer justice and that the imposition of a sentence of five or ten years in the penitentiary in the circumstances heretofore set forth, would have been unjust, and that it was within the power of the District Court of the United States, in said circumstances, to suspend indefinitely the execution of said sentence.

Respondent respectfully refers to the brief of his counsel, and the authorities therein mentioned, in support of the claims made in this answer.

Respondent respectfully submits to and will abide the judgment of this court and will enforce, by proper orders or action, any direction given by this court in the premises.

JOHN M. KILLITS,
Judge of the District Court of the United States, for the Northern District of Ohio.

EDWIN J. MARSHALL,
Counsel.